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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 947

WILLIAM SAMS, MICHAEL GIORANO, FRANK PHILLIPS, THOMAS CIANCUTTI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 19–30) is reported at 340 F. 2d 1014

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1965. Petitions for rehearing filed by all petitioners were denied on February 15, 1965. The petition for a writ of certiorari was filed on March 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions.

2. Whether separate fines could be imposed for violations of 26 U.S.C. 7262 and 26 U.S.C. 7203.

3. Whether the court of appeals considered the issues raised by petitioners on their appeal.

STATUTES INVOLVED

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7262 provides:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

STATEMENT

1. After a trial by jury in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of various offenses under a fifty-count indictment charging conspiracy to defraud the United States and substantive violations of the wagering tax laws. The convictions and sentences of each petitioner are as follows:

Sams was convicted of conspiracy, attempting to evade the excise tax on wagers, failure to pay the special tax on wagers, and wilful failure to pay the special tax on wagers, in violation of 18 U.S.C. 371 and 26 U.S.C. 7201, 7262 and 7203, respectively, as charged in six counts. He was sentenced to pay fines totaling $50,000 and a proportionate share of the costs, and to serve two years' imprisonment with imprisonment suspended upon payment of the fines and costs (R. 493a–494a).[1]

Giorano was convicted of failure to pay the special tax on wagers, in violation of 26 U.S.C. 7262, as charged in one count. He was sentenced to pay a fine of $5,000 and a proportionate share of the costs (R. 499a–500a).

Phillips was convicted of conspiracy, attempting to evade the excise tax on wagers, and wilfully and knowingly filing false returns, in violation of 18 U.S.C. 371 and 26 U.S.C. 7201 and 7206(1), respectively, as charged in four counts. He was sentenced to pay fines totaling $30,000 and a pro-

[1] Record references are to appellants' appendix in the court of appeals, which is a part of the record filed with this Court.

portionate share of the costs, and to serve two years' imprisonment, with imprisonment suspended upon payment of the fines and costs (R. 497a–498a).

Ciancutti was convicted of conspiracy, failure to pay the special tax on wagers, and wilful failure to pay the special tax on wagers, in violation of 18 U.S.C. 371 and 26 U.S.C. 7262 and 7203, respectively, as charged in five counts. He was sentenced to pay fines totaling $25,000 and a proportionate share of the costs, and to serve two years' imprisonment, with imprisonment suspended upon payment of the fines and costs (R. 495a–496a).

The court of appeals: (1) vacated Sam's conviction for attempting to evade the excise tax on wagers; (2) affirmed all of the remaining convictions; and (3) remanded the case to the district court with directions to correct the sentences, holding that the district court's conditional suspension of the terms of imprisonment for an indefinite period lacked finality and was not authorized by statute (Pet. App. A, 28–30).

2. The evidence may be summarized as follows:

In June of 1960, petitioner Ciancutti rented the entire second floor of the Garibaldi Building in New Kensington, Pennsylvania, and contracted and paid for the utility services to that floor (R. 32a–35a, 42a–45a, 61a–64a, 352a–355a, 375a–376a). Ciancutti, who was a professional gambler, admitted that he had acquired the premises for the purpose of carrying on his gambling business (R. 352a–356a, 371a–373a), and that he operated it under the cover name of Triangle Billiards (R. 25a–27a, 362a–363a). He and Al Ross

(also known as Al Seid) arranged and paid for the physical changes necessary to convert the premises into a gambling casino (R. 51a–53a). A carpenter boarded up the windows, put in lights, built several large tables, constructed offices, and replaced the existing entry door with a heavier door having a small "two way" glass window in it (R. 51a–59a, 71a). The entrance was further protected by the installation of a wall blocking the entire stairway to the second floor and containing a door equipped with an electrically operated lock and buzzer system (R. 70a–72a). A Western Union sports ticker and a public address system were installed (R. 65a–67a, 73a).

As remodeled, the casino consisted of a large open room with two "hot dog stand" type enclosures at one end which served as offices (R. 75a–79a). Along one side of the room were about ten tables, at each of which approximately six people could be seated (R. 75a). Pads and pencils were provided at each table for the registering of bets on horse races (R. 75a). On the south and west walls above the tables were boards which showed the horse races being run at every active track in the United States (R. 76a). Racing forms were provided (R. 79a). On the other side of the room were blackjack, dice, and barboot tables (R. 75a–76a).

This gambling casino operated from June of 1960 until September of 1961, during which time bets were accepted on horse races, numbers, baseball games, football games, blackjack, dice, and barboot (R. 77a, 229a, 233a, 352a, 356a–360a, 366a–367a). It was pa-

tronized heavily by local citizens who gambled there on horse races (R. 210a–216a, 219a–221a, 223a, 230a–233a, 237a–241a, 245a–247a, 249a–252a).[2] During the second week of April 1961, agents of the Internal Revenue Service began surveillance of the casino and its patrons (R. 69a), and shortly thereafter the agents gained admittance in an undercover capacity (R. 70a, 183a, 196a). These agents participated in the betting on horse races and other gambling activities at the casino, and observed the methods of operation used by petitioners (R. 72a, 77a–79a, 86a–89a, 171a, 185a–187a, 198a–199a).

The horse betting usually started at 12:30 p.m. and lasted until 6:30 or 7:00 p.m. (R. 77a–78a). The average attendance was seventy to eighty people (R. 83a–84a). Two-thirds of the second floor was used in connection with the horse betting operation (R. 132a). The usual practice was for the bettor to prepare his bets at the tables provided for that purpose, and then submit them to one of several floor men who would deliver them to the south "hot dog stand" type enclosure (R. 73a, 78a–79a). If there was too little time before the race was to begin to place a bet in this manner, the bettor could go directly to the enclosure and place his bet there (R. 79a). The Internal Revenue Service agents testified that they personally placed numerous horse race bets with petitioners Sams, Phillips and Giorano (R. 83a–89a,

[2] The dice and card games were not subject to taxation and regulation under the wagering tax laws; the horse betting was. 26 U.S.C. 4411.

185a–187a, 198a–199a). The public address system announced the preparations for and the actual running of the horse races, and notified those assembled of the results (R. 73a, 81a–82a).

Petitioner Sams supervised the distribution of the proceeds to winning horse bettors and handled the records pertaining to the horse betting (R. 91a, 93a, 99a). Petitioner Giorano worked in the south enclosure, accepting horse-race bets (R. 86a–88a, 185a, 197a–199a). Petitioner Phillips spent most of his time in the south enclosure also, accepting horse-race bets, preparing tally sheets, and handling money for the payoffs to winning bettors (R. 85a, 100a, 109a). Petitioner Ciancutti spent much of his time in the north enclosure, or "dice office," but he was one of the few individuals who had access to both the "dice office" and the "horse office" (R. 91a–92a, 110a, 118a–119a, 135a–139a). The undercover agents observed that Sams, Phillips and Ciancutti frequently met together at a local hotel after leaving the casino (R. 111a–114a). At the conclusion of the evening's betting, Phillips and an employee would collect and pack up the wagering slips and tally sheets, and the package was then handcarried by an employee from the Garibaldi Building to another location (R. 107a–109a).

On August 24, 1961, Internal Revenue Service agents executed a search warrant and seized various items at the casino, including betting slips for horse races (R. 253a–262a). Most of these slips pertained to races on August 24, 1961, the date of the raid, and others were for various dates between August 5 and

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August 24, 1961 (R. 313a–314a). They did not reflect all horse-race bets accepted during August or even on the days represented (R. 313a–314a, 322a). Restricting his computation of taxable gross wagers accepted during August 1961 to the amounts stated on the seized betting slips, a government expert testified that the slips totaled $7,973.00, and the excise tax due was $797.30 (R. 314a–315a). The betting slips for August 23 and 24 alone totaled over $7,500.00, and of that amount nearly $6,000 was on horse races and other sporting events taking place on August 24, 1961 (R. 310a, 312a, 314a).

Petitioner Phillips registered and obtained wagering stamps covering the periods of March 1, 1961, through June 30, 1961, and July 1, 1961, through June 30, 1962 (R. 23a–25a). Phillips also filed monthly excise tax returns for the months of March through August, 1961, showing taxes due in amounts between $371 and $397 for the respective months (R. 13a–14a, 23a–25a). Phillips indicated only one business address on his forms—his residence at 1809 Fourth Avenue, Arnold, Pennsylvania (R. 13a–14a). These forms reflected that Phillips was engaged in the wagering business on his own account, and that he had no employees or agents receiving wagers in his behalf (R. 23a–25a; see Government Exhibits 15 and 16, following R. 476a). On October 11, 1961, petitioner Phillips, as "owner", filed an excise tax return for the month of August, 1961, in which he declared that the gross amount of wagers accepted during the month was $3,200.00 and that the tax due

was $320.00 (R. 10a–11a; see Government Exhibit 1, following R. 476a). None of the other petitioners registered with the Internal Revenue Service during the casino's operation, filed wagering tax returns, or paid the special tax required by 26 U.S.C. 4411. Nor did they pay the monthly excise tax required by 26 U.S.C. 4401, or file any document indicating any connection with the casino's gambling operations (R. 9a–29a).

ARGUMENT

1. a. Petitioners Sams, Giorano and Ciancutti assert that the evidence is insufficient to support their convictions because the government failed to prove wagers on actual sporting events or contests as defined by 26 U.S.C. 4421 (Pet. 8-12). In effect, they argue that the government was required to present direct evidence to establish that the horse races on which bets were placed in the casino actually occurred. The argument is without merit, since this fact, like any other element of the offense, may be proved circumstantially. On the evidence presented to it, the jury was surely entitled to conclude that the patrons of petitioners' gambling casino were not betting thousands of dollars on imaginary horse races. Petitioners' own efforts and expense in providing horse racing forms and Western Union ticker service indicates that they were dealing with actual sporting events. And the continued patronage of numerous local citizens, who testified at the trial that they patronized the casino in order to bet on horse races and other sports events, demonstrates that actual

contests were taking place. Under these circumstances, the prosecution was not required to prove by direct evidence that the particular wagers taken by petitioners related to an actual sporting event.

b. Petitioner Ciancutti separately attacks the sufficiency of the evidence to support his conviction for conspiracy on the ground that the evidence fails to show any connection between his "dice" operation and the horse betting operations of his co-petitioners (Pet. 15). The evidence established, however, that Ciancutti had a substantial interest in the entire casino and its operations. He acquired the property, signed the lease, paid the rent, provided utility service to the casino, installed the Western Union ticker, endorsed checks given to personnel of the Garibaldi Building in connection with gambling debts, claimed various employees of the casino as employees of Triangle Billiards for social security purposes, enjoyed and used his access to both the "horse" office and the "dice" office, and attended meetings with persons connected with the entire operation (R. 25a–27a, 34a, 42a–44a, 63a, 101a–102a, 112a, 114a, 227a–228a, 234a, 273a–274a). This evidence fully supported the jury's finding that Ciancutti had a proprietary interest in the entire operation of the casino, and not merely, as he contended, in the dice game. Compare *United States* v. *Comer*, 288 F. 2d 174 (C.A. 6), certiorari denied, 366 U.S. 925. Indeed, the evidence established that the entire casino was a single business. Money was interchanged between the two offices, several persons performed functions connected with both

the "horse" and "dice" operations, horse race bets were placed with at least two persons claimed by Ciancutti in tax returns as employees of his Triangle Billiards front, the only safe was located in one office and the only telephone was located in the other office, and Ciancutti was observed actually handling horse bet slips in the "horse" office (R. 89a, 90a–91a, 100a–102a, 121a, 129a, 134a–137a, 161a, 174a).

c. Petitioner Phillips attacks, on several grounds, the sufficiency of the evidence to support his conviction for wilful evasion in his wagering (Pet. 16–17). The records seized by the government showed that between August 5, 1961, and the date of the raid, August 24, 1961, Phillips received taxable wagers of $7,973, and more than $7,500 of that amount resulted from wagers made on August 23 and 24, 1961 (R. 312a–315a). Phillips' August return declared that the gross amount of wagers accepted during the entire month was $3,200 (R. 10a–11a; Government Exhibit 1, following R. 476a).

The great discrepancy between the amount of wagers reported by Phillips and the amount reflected by his daily records renders inherently unbelievable the assertions that Phillips was unaware of the difference or that he understated his receipts because his records had been seized by the agents. This is particularly so in view of the care with which Phillips and his associates had surreptitiously removed the betting slips and other records on past occasions from the Garibaldi Building at night. Indeed, the surreptitious nature of the entire operation over a long

period of time is ample evidence of wilfulness. See *Ingram* v. *United States*, 360 U.S. 672, 676; *Minker* v. *United States*, 312 F. 2d 632, 635 (C.A. 3), certiorari denied, 372 U.S. 953. And since this was not a net-worth prosecution, proof of the understatement of receipts was sufficient to justify a jury finding of wilfulness on the tax evasion charge. *Holland* v. *United States*, 348 U.S. 121, on which petitioner relies (Pet. 17), is, therefore, inapposite.

2. There is no merit to the contentions of petitioners Sams and Ciancutti that violations of 26 U.S.C. 7262 merge with violation of 26 U.S.C. 7203 so that separate fines could not be imposed (Pet. 13–14). Section 7262 provides punishment for any person "who does any act which makes him liable" for the wagering tax "without having paid such tax." Section 7203 generally provides punishment for any person "who willfully fails to pay such * * * tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations," and specifically states that such punishment shall be "in addition to other penalties provided by law." The statutory language indicates that Congress intended the punishments of Sections 7262 and 7203 to be cumulative. This construction is supported by the fact that the same section of the original wagering tax provisions enacted in 1951 *both* (1) prescribed the penalty now found in Section 7262 and (2) declared applicable to "willful violations" the sanctions provided by the present Section 7203. 65 Stat. 531, Section 3294 (a) and (c) of the Internal Revenue

Code of 1939. It is quite clear, therefore, that it was Congress' desire to impose upon those who failed to pay a wagering tax a penalty in addition to that which would apply if they failed to pay some other kind of tax.

In *United States* v. *Lewis,* 143 F. Supp. 103 (D. Mass. 1956), the predecessor provisions of the 1939 Code were construed to provide cumulative punishment for wilful failures to pay a wagering tax obligation. Judicial interpretations of the 1954 Code have followed the *Lewis* case, and Congress has made no effort to change the statutes in light of these interpretations. See *United States* v. *Shaffer,* 291 F. 2d 689 (C.A. 7), certiorari denied, 368 U.S. 915; *Reynolds* v. *United States,* 288 F. 2d 78 (C.A. 5), certiorari denied, 368 U.S. 883; *Burks* v. *United States,* 287 F. 2d 117 (C.A. 9), certiorari denied, 369 U.S. 841.

3. All petitioners assert that the court of appeals "refused to pass upon" the question of whether the government proved "an essential element of the substantive crimes in violation of the Wagering Tax Laws," and the "doctrine of merger" (Pet. 16). There is no substance to these assertions, which are apparently based upon nothing more than the court's election not to discuss these issues in its written opinion. The issues were included in petitioners' brief before the court of appeals. Furthermore, petitioners, in separate petitions for rehearing, specifically complained of this alleged refusal to "pass upon" the issues so that the court of appeals was fully aware of this claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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